No. 12,514

IN THE

United States Court of Appeals

For the Ninth Circuit

ORESTUS CAVNESS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

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The Appellee's contentions in the Brief filed in the above entitled matter are as follows:

(1) There was lawful seizure.

(a) The officers were seeking to serve a valid search warrant.

(b) The first restraint of the Appellant by the officers constituted a lawful arrest.

(c) The Appellant committed a violation of Section 2553 (a) Title 26, U. S. Code in the presence of the officers and, therefore, his arrest was lawful.

(d) The cocaine seized was exposed to the public view and was not in or from the original stamped package and, therefore, its seizure was lawful.

(2) The Trial Court did not err in denying the Appellant's Motion for Mistrial.

(3) The Appellant was not entitled to the judgment of acquittal on the ground there was no evidence the cocaine was not in or from the original stamped package.

(4) The Appellant was not denied a fair trial because a reserve police officer served on the jury.

(5) There was no prejudicial misconduct on the part of one of the jurors.

ARGUMENT.

I. THE SEIZURE OF THE COCAINE WAS THE RESULT OF AN UNLAWFUL SEARCH.

A. The search warrant was invalid for there was no probable cause for its issuance.

The Appellee, on page 7 of its Brief, contends that the United States Commissioner had probable cause for the issuance of a search warrant and quotes 47 *Am. Jur.* 517-519 in support of its contention. It has apparently overlooked some of the more important sentences found in its authority, particularly on page 517 of said volume.

> "A search warrant may issue only on evidence which would be competent in the trial of the offense before a jury, and would lead a man of prudence and caution to believe that the offense has been committed * * * The proof of probable cause which must be made before a search warrant may be issued must be of facts *so closely related to the time of the issue* of the warrant as to justify the finding of probable cause at *that* time * * *" (Italics ours.) 47 *Am. Jur.* 517.

In the case at hand, the purchase of cocaine was actually made by the Affiant, Gerry Wilson on July 7, 1949, and not on July 10, 1949, as alleged in the affidavit (Tr. 180). Agent Wells, a witness called for and by the Appellee, testified that the purchase of cocaine by the Affiant was made on July 7, 1949, and not on July 10, 1949 (Tr. 180). A period of five (5) days elapsed before the search warrant was issued (Tr. 5-7), but a period of twelve (12) days had elapsed before the search warrant was served. The facts on which the search warrant were based were, contrary to the rule previously stated, not so closely related to the date of the issue of the search warrant so as to justify a finding of probable cause at that time.

Whether or not the Affiant made any purchases of cocaine during the month of June, 1949 (Tr. 4), is immaterial in determining whether or not there was probable cause for the issuance of a search warrant, for the fact of the alleged purchase must be closely related to the time of issue of the search warrant, the time in this case being July 12, 1949. No assumption

can be made as to a purchase on July 10, 1949, as argued by the Appellee, for by the Affiant's sworn testimony, the only other purchases made by her, outside of the purchase alleged to be made on July 10, 1949, were made from June *to* July, 1949 (Tr. 5-7). This precludes any assumption that there were any other purchases made in July.

The Appellee quotes from *Pera v. U. S.,* 11 F. (2d) 772, as authority for believing an error in the date on the search warrant is immaterial, but that case is inapplicable to the situation at hand. There the Court deemed the error made to be an obvious clerical error and, furthermore, unlike the case at hand, the Court considered it very important that no objection was made in the trial Court by the defendant as to the service or the form of the search warrant.

B. The first restraint of the Appellant was not a lawful arrest.

The Appellee justifies the arrest of the Appellant on July 19, 1949, if there was such, by the alleged illegal sale of cocaine to the Affiant Gerry Wilson on July 7, 1949. It regards the information advanced by the Affiant to be "reliable information", sufficient to justify an arrest without a warrant. The contrary is indicated by the record. In the first place, Agent Wells knew little or nothing at all about the Affiant or her credibility (Tr. 86). Secondly, the Affiant was a "stool pigeon" or "informant" and certainly not the best of citizens (Tr. 82). Thirdly, the Affiant herself was guilty of illegal possession of narcotics (Tr. 88). We would like once again, to refer to *U. S. v. Clark,* 29

F. Supp. 138 quoted on page 11 of our opening Brief in which the Court felt that even a positive statement from a citizen of *good* reputation would not in itself justify an arrest of another citizen by an officer without a warrant.

Assuming, but not conceding the reliability of the information, there was no legal arrest for proper procedure to cover a situation such as this would have resulted in a warrant of arrest being executed by the Affiant. It is only in a few well-defined situations that arrests without warrants are valid. This is not one of those as argued in the preceding paragraph and because in this case twelve (12) days had elapsed from the time of alleged violation until the date of the arrest. During these twelve (12) days, it would have been easy indeed to have had a warrant of arrest issued.

Assuming further, but not conceding that there were grounds for a lawful arrest, we contend the Appellant was never lawfully arrested. The law of arrest requires an act of taking, seizing or detaining of another, but the act constituting an arrest must be performed with the intent to effect an arrest and must have been so understood by the one being arrested (4 *Am. Jur.* 5). The record is totally void of a showing of any such intent by the officers who allegedly arrested the Appellant at the first moment of the meeting between the officers and the Appellant. Mr. Wells testified that the Appellant was not arrested at the time the officers were brutally beating him (Tr. 121-122), and it was

not until the Appellant was taken into the house that he was arrested (Tr. 54 and 121). The physical restraint by the officers was not pursuant to any lawful arrest but merely action on the part of the officers to beat the Appellant into physical submission. Furthermore, there was no showing by the Appellee that the Appellant ever understood he was being arrested.

There was no time for the usual laying of hands and a recital of the standard formula used in arrests, it is claimed by the Appellee. The record speaks to the contrary for there were six (6) officers who spent three (3) to five (5) minutes (Tr. 124 and 393) beating the Appellant into physical submission. During this period none of the officers found time to announce an intention to arrest the Appellant, yet there was apparently time enough for one of them, Agent Wells, to replace his badge and the search warrant into his pocket before the subduing process began (Tr. 167-168). There was time, too, for the officers to discuss what the Appellant had in his hand (Tr. 173), to make a request to one of them to open the Appellant's hand (Tr. 173) and enough time to walk the Appellant to the house (Tr. 163).

C. The Appellant was not committing a violation of Section 2553 (a), Title 26, U. S. Code, in the presence of the officers and his arrest and the seizure of the cocaine were unlawful.

The Appellee tries to justify the alleged arrest of the Appellant by what was determined, subsequent to the arrest and through chemical analysis, to be cocaine. The Appellant was alleged to have been in the practice of selling narcotics; the Vicks inhaler which the Ap-

pellant had in his hand, at the time of the struggle with the officers, was suspicious looking and thought to contain cocaine; and, finally, the Appellant acted suspiciously by resisting service of the search warrant. These reasons, it is argued, warranted the arrest of the Appellant on the grounds of having committed a violation of Section 2553, Title 26, U. S. Code, in the presence of the officers. These grounds may have been sufficient to arouse suspicion but were not sufficient to constitute "probable cause", a necessary element in order to arrest without a warrant. *Brown v. U. S.* (CCA, 9th Circuit), 4 F. (2d) 246; *Snyder v. U. S.* (CCA, 4th Circuit), 285 F. 1, 2; *U. S. v. Clark,* 29 F. Supp. 138. Furthermore, the arrest cannot be justified by the determination, through subsequent chemical analysis, that the capsules attached to the Vicks inhaler were cocaine. *Hernandez v. U. S.* (CCA, 9th Circuit), 17 F. (2d) 373. The arrest must be legal and valid at the time it was made and cannot be substantiated by subsequent events or knowledge.

Carroll v. United States, 267 U.S. 132, has been quoted by Appellee on page 11 of its Brief in support of its contention. The *Carroll* case arises under the National Prohibition Act, an Act which provides that an officer, if he shall *"discover"* any person in the act of transporting liquor in an automobile, shall seize the said liquor, take possession of the vehicle and arrest the person in charge. The right to search an automobile and seize liquor under this law does not depend on the right to arrest the offender in the first instance, and the common law right to arrest is not

the test of the validity of the subsequent search and/or seizure, the Court held. Then, too, probable cause permitting arrest is more easily satisfied and by less stringent requirements because of the use in the National Prohibition Statute of the word "discover".

D. The search warrant did not permit a search of the lawn.

The capsules containing cocaine were found only after a search of the lawn (Tr. 285). The search warrant did not permit a search of the lawn. The basis for the issuance of the search warrant by the United States Commissioner was the Affidavit made by Gerry Wilson. A scrutiny of the affidavit reveals positive statements that "in a *one story wooden frame building* located at 3811 Leahi Avenue said building is painted white with red trimming, * * *" there was then being concealed and sold cocaine. The search warrant further reads: "Affiant further states that while *in* the premises * * * she had seen Orestus Cavness after he had received the money, he would go into another part of the *house* and return in a few minutes and would deliver the cocaine to the customer * * *" (Italics ours). There can be only one interpretation made of the statements set forth in the Affidavit. The place authorized to be searched was the wooden frame building, for the cocaine sold by the Appellant was obtained in another part of the house.

56 *Corpus Juris,* 1233, provides:

> "The description (of the place to be searched) must be so specific so as to void any unauthorized invasion of the rights of privacy and the warrant

must identify the property as to leave no discretion as to the place to be searched."

Appellee quotes 56 *Corpus Juris,* 1234, to justify the search of the Appellant's lawn but the case supporting this quotation is one in which the premises to be searched was described as being a "ranch". The word "ranch", it was held, included the house and the surrounding real property. In this case, the premises authorized to be searched is a wooden frame building and that alone.

II. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A MISTRIAL.

Moore v. U. S., 150 U.S. 57, governs the statement made by Officer Souza regarding the Appellant's apparent condition, to-wit: "hopped-up" (Tr. 402). This statement had no legitimate bearing on the question at issue and was only calculated to prejudice the accused in the mind of the jurors. After this remark was made, an impression unfavorable to the Appellant had been made on the minds of the jurors and no matter what the trial judge said, such could not and did not erase this impression from their minds. As a result, the Appellant was denied a fair trial.

Christensen et al. v. U. S., 16 F. (2d) 29, quoted on page 13 of the Appellee's Brief can be distinguished for the prejudicial remarks made in that case were ones which the Court felt were brought about by the counsel for the Appellant. Consequently, the

Appellant could not complain on appeal, especially since he had not made a timely exception at the time the alleged prejudicial remarks were made in the trial Court.

III. THE APPELLANT WAS DENIED A FAIR TRIAL BECAUSE A RESERVE POLICE OFFICER SERVED ON THE JURY.

All of the prospective jurors were asked whether or not any of them had ever been a reserve officer in the Honolulu Police Department. The record, it is claimed, does not show that Mr. Parish, who was a member of the Reserve Police Organization of the City and County of Honolulu (Tr. 539), heard the question. Appellee would place a duty upon the Appellant in this case to show that all members of the jury panel heard this question. It is more logical for a presumption to arise to the effect that Mr. Parish heard this question, for he was in the room and within hearing distance.

Had Mr. Parish complied with his duty to reveal his status as a member of the Reserve Police Organization, a duty which the Court in *U. S. v. Lampkin,* 66 F. Supp. 821 places on a juror and not on a defendant, he would never have served as a member of the jury. Here was a situation in which the juror, by failing to respond to the question put to the jury panel, prejudiced the Appellant and denied to him a fair trial, for by doing this, the Appellant was never given an opportunity to challenge the juror. Challenges to prospective jurors have been set up in our

system of law for the purpose of assuring an impartial and fair trial. If this purpose is to be accomplished, then the opportunity to use the challenge must be available and cannot be circumvented because a juror has failed to respond to a proper question asked of the jury panel, especially when but for such failure information, which would have been basis for a challenge, would have been revealed. For this reason the Appellant was denied a fair and impartial trial.

CONCLUSION.

We respectfully submit that the trial Court erred in the foregoing matters brought before it in the trial of this case and that therefore, the judgment of the Trial Judge should be reversed and a new trial be granted.

Dated, Honolulu, T. H.,
October 20, 1950.

Respectfully submitted,
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